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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 692

THE MORRISON MILLING COMPANY, PETITIONER

v.

ORVILLE L. FREEMAN AND COMMODITY CREDIT CORPORATION

No. 693

GENERAL MILLS, INC., ET AL., PETITIONERS

v.

ORVILLE L. FREEMAN AND COMMODITY CREDIT CORPORATION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Columbia (R. 93–99)[1] is

[1] "R." refers to the Joint Appendix in the court of appeals, nine copies of which petitioner The Morrison Milling Company has filed in this Court. "Pet. App." refers to the appendix to the petition for a writ of certiorari of The Morrison Milling Company.

unreported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. B1–10) is reported at 365 F. 2d 525.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1966. The petitions for writs of certiorari were filed on October 17, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture's regulation (7 C.F.R. 777.11(a)) requiring wheat processors to purchase domestic marketing certificates equivalent to the number of bushels of wheat used in processing flour and other food products is inconsistent with the governing statute (7 U.S.C. 1379d(b)).

2. Whether the Secretary's regulations (7 C.F.R. 777, Appendix II) limiting the deductions from the gross weight of wheat, upon which processors are required to purchase certificates, are arbitrary, discriminatory and without rational basis.

STATUTE AND REGULATIONS INVOLVED

The statute to be construed is the Agricultural Adjustment Act of 1938, 52 Stat. 31, as amended by the Food and Agriculture Act of 1962, 76 Stat. 605, and the Agricultural Act of 1964, 78 Stat. 173, 7 U.S.C. 1281 *et seq.* The Secretary's Processor Wheat Marketing Certificate Regulations are found in 7 C.F.R. Part 777 (1966).

The statute provides, in pertinent part, as follows:

§ 1379d. ***Marketing restrictions.***

* * * * *

(b) *Processor and exporter acquisition of domestic and export certificates; international trade; expansion; refunds or credits for certificates; exemptions from requirements.*

During any marketing year for which a wheat marketing allocation program is in effect, (i) *all persons engaged in the processing of wheat into food products shall,* prior to marketing any such food product or removing such food product for sale or consumption, *acquire domestic marketing certificates equivalent to the number of bushels of wheat contained in such product* and (ii) all persons exporting wheat shall, prior to such export, acquire export marketing certificates equivalent to the number of bushels so exported. * * * [Emphasis supplied.]

* * * * *

§ 1379j. *Regulations.*

The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of sections 1379a–1379j of this title including but not limited to regulations governing the acquisition, disposition, or handling of marketing certificates.

The Secretary's regulation (7 C.F.R. 777.11) provides, in pertinent part, as follows:

§777.11 *Time and manner of acquiring and surrendering certificates.*

(a) *General.* Food processors shall acquire certificates and surrender certificates to CCC as provided in paragraphs (b) and (c) of this section and in the manner specified in § 777.10. The number of certificates acquired by the food processor and surrendered to CCC shall be

equivalent to the number of bushels of wheat used in processing the food products for which certificates must be acquired and surrendered. Such quantity of wheat shall be determined and reported to CCC as provided in §§ 777.12 to 777.14 on the basis of the weight of wheat used in processing the food products or by application of conversion factors to the weight of food products obtained in the processing operation. [Emphasis supplied.]

STATEMENT

Beginning with the Agricultural Adjustment Act of 1938, 52 Stat. 31, 7 U.S.C. 1281 *et seq.*, Congress has attempted to stabilize the price of various agricultural commodities, including wheat, and to prevent overproduction. In the Agricultural Act of 1964, 78 Stat. 173, which related to the crop years 1964 and 1965, Congress enacted a new program to achieve these objectives, involving the use of "wheat marketing certificates."

Prior to the 1964 Act wheat farmers complying with the acreage allotment program were guaranteed $2.00 per bushel of wheat by (1) a price support loan averaging $1.82 per bushel and (2) a Commodity Credit Corporation (hereinafter "CCC") subsidy of 18¢ per bushel (R. 74). For the 1964 crop year the national average loan rate was reduced from $1.82 per bushel to $1.30 per bushel (R. 73). In order to maintain a fair income level for growers, the 1964 Act provided for the issuance of "wheat marketing certificates" to farmers who complied with the requirements of the program. 7 U.S.C. 1379c(b).[2] Farmers receiving such certificates could (1) sell them to processors who were required to purchase certificates equivalent to

the amount of wheat contained in the food products they processed (7 U.S.C. 1379d(b)), or (2) present them for redemption by the CCC, in either case at a price equal to the face value of the certificates as determined by the Secretary. 7 U.S.C. 1379c (a), (c).

The Act required the Secretary to determine a "wheat marketing allocation" for each crop year, *i.e.*, to determine (1) the amount of wheat which he estimated would be used for food products for consumption in the United States, and (2) a portion of the amount of wheat which he estimated would be exported. 7 U.S.C. 1379b.[3] Marketing certificates equivalent to the number of bushels in the allocation were to be distributed among complying growers: domestic certificates, for the portion of the allocation representing the estimated amount of wheat to be used for food products for consumption in the United States; and export certificates, for the portion of the allocation representing wheat used for exports. 7 U.S.C. 1379c(a).

The Act provided a complex formula under which marketing certificates equivalent to the wheat marketing allocation would be distributed among the total number of complying growers. 7 U.S.C. 1379b, 1379c(a). The formula was designed to take into account the fact that some wheat growers would elect

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[2] Wheat marketing certificates were issued to growers who agreed to keep within specified acreage allotments and who agreed, in addition, to devote a portion of their normal wheat allotment to specified soil conservation purposes. 7 U.S.C. 1339(a)(1), 1379c(b).

[3] The allocation included that portion of the estimated exports on which the Secretary determined that marketing certificates should be issued in order to achieve certain specified objectives as to growers' income. 7 U.S.C. 1379b.

not to comply with the program, and to provide a mechanism by which the certificates which would have gone to the non-complying farmers would be distributed to the growers who elected to comply.[4]

The Secretary estimated that during the 1964 crop year 500 million bushels of wheat would be used for food for consumption in the United States, and that export certificates should be issued on an additional 500 million bushels of estimated exports (R. 37–38). Pursuant to the statutory formula (7 U.S.C. 1379c (c)), the Secretary set the face value of domestic certificates at 70¢ per bushel, and of export certificates at 25¢ per bushel (R. 38). Thus, complying farmers in 1964 were entitled to receive a total of $2.00 per bushel through price support loans and through the issuance of domestic certificates on that portion of their production estimated to be used for food for consumption in the United States; a total of $1.55 a bushel through price support loans and the issuance of export certificates on the portion of their production estimated to be exported; and $1.30 a bushel on the remainder (R. 74).

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[4] In the Food and Agriculture Act of 1962, 76 Stat. 605, Congress had enacted a program involving the use of wheat marketing certificates in which participation by all wheat growers was compulsory. The 1962 Act was intended to become effective during the 1964 crop year, but did not receive the approval of two-thirds of the wheat growers and therefore never went into effect (R. 72).

As noted above, the 1964 Act required wheat processors to purchase domestic marketing certificates equivalent to the total number of bushels of wheat "contained in" food products processed by them. 7 U.S.C. 1379d(b).[5] In order to facilitate the movement of certificates from farmers to millers, the CCC acted as a conduit or intermediary, issuing domestic marketing certificates to complying producers and selling such certificates to processors. In practice, certificates were seldom used; the farmer received from the CCC 70¢ per bushel of wheat in his domestic allocation, and each processor was required to pay 70¢ per bushel to the CCC for all the wheat milled into food products (R. 74–75).

As required by the statute (7 U.S.C. 1379j, 1379f), the Secretary, after consultations with representatives of the processing industry, issued regulations implementing the statute. The regulations required processors to purchase domestic certificates equivalent to the "number of bushels of wheat used in processing the food products" (7 C.F.R. 777.11(a)). The regulations also provided that the millers could determine their certificate liability either (1) on the basis of the actual weight of the wheat (7 C.F.R. 777.13) less deductions for dockage (*i.e.*, impurities) and for dehydration during storage up to 0.6% (7 C.F.R. 777,

[5] Exporters were also required to acquire export marketing certificates equivalent to the total number of bushels of wheat exported by them. 7 U.S.C. 1379d(b).

Appendix II), or (2) by the application of conversion factors so as to derive an approximation of the number of bushels of wheat from the weight of the finished food product (7 C.F.R. 777.14).[6]

Petitioners brought these actions for a judgment declaring unlawful the Secretary's regulation requiring processors to purchase certificates equivalent to the "number of bushels of wheat used in processing the food products" (7 C.F.R. 777.11(a)). Their principal contention is that the regulation conflicts with the language of the Act (7 U.S.C. 1379d(b)), requiring processors to purchase "certificates equivalent to the number of bushels of wheat contained in

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[6] In the Food and Agriculture Act of 1965, 79 Stat. 1187, Congress continued the wheat marketing certificate program for the crop years 1966 through 1969. The provision of 7 U.S.C. 1379d(b) requiring wheat processors to purchase domestic certificates equivalent to the total number of bushels of wheat "contained in" food products processed by them was not affected by the 1965 amendments. The Secretary's regulations affecting processors, referred to herein, were not changed significantly. However, under the 1965 Act, for the first time, the face value of domestic certificates issued to farmers differed from the price at which such certificates were sold to processors. The face value of domestic certificates issued to farmers was increased substantially, but the 1965 Act required that the price at which the certificates were sold to processors be maintained at approximately the same level as under the 1964 Act. For the 1966 crop year, the face value of domestic certificates for farmers was $1.32 per bushel, and the cost of the certificates to processors was 75¢ per bushel. The face value for domestic certificates had previously been increased to 75¢ for the 1965 crop year. See 7 U.S.C. (1965 Supp.) 1379e, 1445a; 7 C.F.R. 777.4(a).

such product." Petitioners urge that, while the Secretary's regulation requires the processors to purchase certificates for all of the wheat purchased from wheat growers for use in food products, the statute requires only that the processors buy as many certificates as there are bushels of wheat physically incorporated in the flour or other food products. Petitioners' alternative contention is that the Secretary's regulations (7 C.F.R. 777, Appendix II) are "arbitrary, discriminatory and without rational basis" since they allow only limited deductions for impurities, defective kernels, and dehydration.

A wheat kernel consists, in general, of three elements—endosperm (83%), which is the source of white flour; bran (14½%), which is included in whole wheat flour or used for animal food; and germ (2½%), which is used for animal food (Exhibit 5 to Godfrey affidavit, R. 43). A bushel of wheat as delivered to the processor contains impurities and defective kernels which must be screened out in the milling process, and moisture which is lost in storage and in processing (R. 41–43). Petitioners' contention is that Section 1379d(b) requires processors to pay 70¢ per bushel only for that portion of the wheat (principally the endosperm) that is retrieved for human consumption and not for the portions (principally "millfeeds" (R. 23–24)) that are removed in the milling process. Since in the production of flour from wheat some 27 or 28 percent of the wheat is

removed (R. 39, 75),[7] under petitioners' theory the processors' certificate price would be approximately 51¢ for each bushel of wheat utilized, instead of the 70¢ per bushel of wheat received by the farmer (R. 75).[8] When multiplied by the appropriate number of bushels, the difference between those two amounts is approximately $95 million for each of the crop years 1964 and 1965 (R. 39).

On cross-motions for summary judgment the district court entered judgment for the respondents. The court of appeals (Bazelon, C. J., and Danaher and McGowan, JJ.) unanimously affirmed. Noting that petitioners' contentions as to the "plain meaning" of the Act reflected "a highly optimistic view of the human capacity to communicate precise meaning by the written word," the court found that the statutory language here was not so clear as to preclude resort to the legislative history (Pet. App. B 4–5). That history, it found, leads "ineluctably * * * to a firm impression that all persons interested in the legislation, including the millers themselves" understood that under the legislation "one buying a bushel of wheat from a farmer to make flour would have to pay 70 cents for a certificate," and thus that the Secretary's reading of the Act was correct (Pet. App. B 7).

Separate petitions to review the decision of the court of appeals were filed by The Morrison Milling Company (No. 692), and by General Mills, Inc. and

[7] The reference in the court of appeals opinion (Pet. App. B–4) to a figure of 18% is apparently a typographical error.

[8] 72%×70¢=50.4¢.

others (No. 693). Because the two petitions raise identical legal issues we submit this joint reply.

ARGUMENT

Relying upon what they deem to be the plain meaning of 7 U.S.C. 1379d(b), petitioners challenge, as inconsistent with the statute, the Secretary of Agriculture's regulation requiring the purchase by wheat processors of domestic marketing certificates equivalent to the wheat used by them in producing food products. The Secretary's regulation, however, is a reasonable interpretation of the statutory language and effectuates the congressional purpose. Accordingly, both courts below were clearly correct in sustaining the regulation. While the amount sought by petitioners for the crop years 1964 and 1965 is large,[9] the issue raised by the petitions has no prospective significance, for petitioners' contentions were considered and expressly rejected by Congress when, in the Food and Agriculture Act of 1965, 79 Stat. 1187, it enacted a wheat certificate program for the crop years 1966 through 1969 (see n. 10, *infra*, p. 12). Accordingly, since there is no conflict of decisions, further review by this Court is not warranted.

1. The chief issue presented by these petitions—whether the Secretary improperly required processors to purchase certificates for each bushel of wheat used

[9] The cost of the marketing certificates which petitioners purchased in 1964 and 1965 was a cost of doing business, and presumably was passed on to their customers. There is, however, no reason to suppose that petitioners would pass on to their customers that portion of the cost which they seek to recapture in this litigation (estimated to be approximately $95 million a year, or a total of approximately $190 million (R. 39)).

in the process of making flour or other food products, instead of for each bushel of the refined product (*supra*, p. 9)—was specifically brought to the attention of Congress when, in the Food and Agriculture Act of 1965, 79 Stat. 1187, it enacted a wheat certificate program for the crop years 1966 through 1969. At that time, petitioners' contentions were explicitly rejected,[10] thus disposing of comparable claims under the 1965 Act, and depriving the issue of any prospective significance.

2. Petitioners rely upon the "plain meaning" of the statute without reference to the legislative history, design or purpose. That reliance is misplaced, not only because a statute should be interpreted to carry out its purpose even if the literal words (read in

[10] H. Rep. No. 631, 89th Cong., 1st Sess., p. 44:

"The committee is aware of the lawsuit which has been brought by processors against the Secretary alleging that the regulations of the Department are inconsistent with the statute. Because of the critical importance of this matter to the whole statutory framework of the certificate program, the committee gave consideration to amending the language of the statute to make it doubly clear that the Congress intends that the processor be required to purchase certificates equivalent to the total number of bushels of wheat used in processing flour and other food products without deduction for the byproducts and wastes resulting in processing of flour or other food product, and not merely on the net weight of the flour or other food product, as contended by the processors. However, the committee believes that no amendment is needed. *The present language of the statute in the opinion of the committee clearly expresses the congressional intention that the processor be required to purchase certificates equivalent to the total number of bushels of wheat used in processing flour and other food products.* * * *" (Emphasis added.)

isolation) convey a contrary meaning,"[11] but also because the meaning of the statute here is far from "plain" and does not lead unambiguously to petitioners' conclusion.

Wheat, as such, is not "contained in" a food product. Wheat is a raw material which, by processing, is converted into flour or other food products (see Exhibit 5 to Godfrey Affidavit, R. 43). Thus, "wheat"—as defined in the Official Grain Standards (R. 41) and as understood in the grain market—no longer exists when the processing operation is completed; a wholly different commodity—flour—has been produced. Nor can it be said that the "ordinary, everyday" sense of the language supports only petitioners' interpretation. For, as the court of appeals recognized (Pet. App. B 5), the terms "contained in" and "used in" are frequently interchangeable in everyday speech. While Section 1379d(b) requires processors of food products to "acquire domestic marketing certificates equivalent to the number of bushels of wheat contained in such product * * *," Section 1379c(a) directs the Secretary to arrange "for the issuance of domestic marketing certificates for the portion of the wheat marketing allocation representing wheat *used for* food products for consumption in the

[11] *E.g.*, *Perry* v. *Commerce Loan Co.*, 383 U.S. 392, 399–400; *United States* v. *Shirey*, 359 U.S. 255, 260–261; *United States* v. *American Trucking Assns.*, 310 U.S. 534, 542–543.

Even if the statute were a tax measure, as petitioners contend, the same rule would apply. See *e.g.*, *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479; *Haggar Co.* v. *Helvering*, 308 U.S. 389, 394; *White* v. *United States*, 305 U.S. 281, 292; *United States* v. *Whitridge*, 197 U.S. 135, 143.

United States * * *'" (emphasis added). It seems evident that Congress regarded the two terms as synonymous.

Petitioners' contentions ignore the nature of the program Congress devised. From the Act as a whole it is clear that Congress anticipated that the total number of certificates issued to farmers would equal the total number of certificates needed by processors—at least if the Secretary's forecast of "the amount of wheat [that] will be used * * * for food products for consumption in the United States" (7 U.S.C. 1379b) proved accurate. The Act does not involve two distinct types of domestic certificates—one for farmers and one for processors—but only a "marketing certificate" that was to be issued to farmers and purchased by processors. See 7 U.S.C. 1379c(a) and (c), 1379d(b). It was thus hoped that the processors would bear the cost of this aspect of the wheat subsidy program. Under petitioners' interpretation of the Act, processors would have needed significantly fewer certificates than were to be issued under the Act to farmers. That interpretation, therefore, would frustrate the congressional purpose to balance the payments to the growers by receipts from the processors. That purpose is disclosed by 7 U.S.C. 1379e, which authorizes the Secretary to charge processors, "in addition to the face value" of the certificates, enough "to cover estimated administrative costs * * * and estimated in-

terest incurred on funds of the Corporation [CCC] invested in certificates purchased by it."[12]

Petitioners urge that their construction of Section 1379d(b) is confirmed by Section 1379f,[13] which they interpret as requiring the Secretary to establish conversion factors for use in determining the amount of wheat physically incorporated in flour from the amount of wheat used in manufacturing flour (Morrison Milling Pet. 16–18; General Mills Pet. 22). Since little besides wheat goes into the making of flour, petitioners are arguing, in effect, that Congress intended the conversion factors to be used to establish

[12] The claim is made (Morrison Milling Pet. 11–12) that for the 1964 crop year the CCC realized a net profit of $75.2 million from the domestic marketing certificate program. In point of fact, the $75.2 million figure was merely an estimate of the position of the CCC for the crop year 1964 with respect to both the domestic and the export certificate programs. Although the figures have not been published, we are informed by the Department of Agriculture that the excess of domestic certificates purchased by processors over domestic certificates received by growers was approximately $24.2 million in 1964 and $10.375 million in 1965. The discrepancies reflect the fact of inaccurate estimates by the Secretary, but the goal of the statute was still equivalence. Moreover, if petitioners prevail in this suit and realize $190 million for the years 1964 and 1965, the government would obviously incur a huge deficit for those years. In the Food and Agriculture Act of 1965 Congress provided that for the crop years 1966 through 1969 the cost of any excess of domestic certificates issued to producers over domestic certificates acquired by processors should be borne by the CCC. 7 U.S.C. (1965 Supp.) 1379b.

[13] 7 U.S.C. 1379f provides:

"The Secretary shall establish conversion factors which shall be used to determine the amount of wheat contained in any food product. The conversion factor for any such food product shall be determined upon the basis of the weight of wheat used in the manufacture of such product."

the weight of the flour. This argument ignores, as the court of appeals noted (Pet. App. B 6, fn 1), the historical background to Section 1379f. For many years preceding the enactment of the statute the Department of Agriculture had established and employed conversion factors for the benefit of processors who did not have adequate facilities for weighing wheat. On the other hand, processors necessarily have facilities for weighing flour since price depends on weight as well as quality. The established conversion factors, therefore, provided a means of determining the weight of the wheat. These factors were changed from time to time after consultations with milling industry representatives and, after the enactment of the 1964 Act, regulations provided for similar conversion factors for flour under the domestic marketing certificate program (R. 68–69).

In light of the historic background of Section 1379f, and the statute's interchangeable use of the terms "contained in" and "used in", the correct meaning of Section 1379f emerges. The conversion factor to be established by the Secretary "shall be used to determine the amount of wheat contained in any food product." The unknown, therefore, is wheat, not flour or other food products. The statute then provides that, for use in finding the unknown quantity in any particular case, the Secretary shall establish "a conversion factor" for each type of product and that factor is to be derived "upon the basis of the weight of the wheat used in the manufacture of such product." In other words, the conversion factor, to be applied to the flour,

is designed to establish the amount of wheat used in its manufacture through the application of a conversion factor based upon the normal quantitative relationship between wheat and flour.

From the foregoing it seems apparent that the Secretary's regulation (7 C.F.R. 777.11(a)) is consistent with the statutory language and serves the legislative purpose.[14] In addition, the correctness of the Secretary's interpretation is confirmed by the congressional understanding as to the cost of the certificate program to the processors. It was generally understood during the congressional debates on the 1964 Act that the millers would pay a total of approximately $2 per bushel under the new program—reflecting the average CCC loan rate of $1.30 per bushel plus a 70¢ certificate for each bushel milled. This could be true only if the millers were required to pay for their certificates on the basis of all the wheat used in processing food products. While critics of the program suggested that the actual cost would be more than $2.00, nowhere in the legislative history did anyone suggest that the millers' cost per bushel of wheat would be less than

[14] A regulation duly issued by the agency charged with administering the statutory scheme is, of course, valid unless "unreasonable" and "plainly and palpably inconsistent" with the underlying statute. *Boske* v. *Comingore*, 177 U.S. 459, 470; *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501; *Udall* v. *Tallman*, 380 U.S. 1, 16. And where, as here, the administrative practice "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion" while the statute is "untried and new," particularly great weight should be accorded the administrative construction. *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315.

$2.00. See, for example, the exchange between Senator McGovern, the floor manager of the wheat bill, and Senator Morton, 110 Cong. Rec. 4169, quoted by the court of appeals (Pet. App. B 6–7, fn. 2).[15] Similarly, in the House of Representatives, Congressman Purcell, the floor manager of the wheat bill, stated (110 Cong. Rec. 6383):

> Domestic millers will know in advance the value of the marketing certificates they must purchase. * * * They know that with every 1,000 bushels of wheat purchased and utilized for domestic food products they must purchase the equivalent number of wheat marketing certificates at the price set for the entire marketing year by the Secretary of Agriculture.

Moreover, the present position of petitioners to the effect that the price of a bushel of wheat to the millers should be roughly $1.80 (based on the $1.30 loan price plus certificate cost of 50¢) is in contrast to the position of the millers at the time the 1964 Act was under consideration. At that time, the millers recognized that they would be required to pay for their certificates on the basis of all the wheat used in processing a food product, and contended that the cost of wheat to them would rise above $2. See 110 Cong. Rec. 7178–

[15] See, also, S. Rep. No. 874, 88th Cong., 2d Sess., pp. 17–18 (1964); 110 Cong. Rec. 4105, 4169–4170, 4634, 4637, 4639, 7175, 7178, 7309, 7312, 7325–7326, 7335.

In the course of the debate, Senator McGovern read to the Senate a statement from the Secretary to the effect that if the bill were enacted, the cost of wheat to millers, including the value of the certificates, should be about the same as in recent years inasmuch as under the proposed legislation the support price would be around $2 per bushel (110 Cong. Rec. 4370).

7182; Hearings before the Senate Committee on Agriculture and Forestry, 88th Cong., 2d Sess., Vol. 2, pp. 86, 129–130, 144–145 (1964).

3. In addition to their principal contention, petitioners argue that the regulations are "arbitrary, discriminatory and without rational basis" since they require processors to pay for foreign substances and unsuitable wheat, wastage and shrinkage (Morrison Milling Pet. 26–27; General Mills Pet. 11, 21).[16]

In point of fact, a substantial portion of the foreign matter is accounted for by dockage, which is not considered to be wheat and is eliminated from the weight upon which certificate payments are made (R. 41–42). In addition, the processor is not required to include in the weight of the bushel of wheat shrinkage (from dehydration during storage) up to 0.6% (R. 43). Even though not all foreign matter is included in dockage, and assuming shrinkage can exceed 0.6%, the fact is that these additional losses are inherent in the milling process (R. 43). Moreover, damaged kernels and foreign materials, to the extent that they are not accounted for in dockage, are factors determining quality, upon which the market price of wheat is based (R. 42–43). Petitioners' fundamental complaint, therefore, is that the Secretary has based their certificate liability on quantity, and has given no consideration to quality differentials. However, there is nothing in the statute remotely suggesting that payments were to be based upon quality; indeed, the legislative history is

[16] Petitioners admit, as they must (Morrison Milling Pet. 26, fn. 25), that the principal portion of their claim is represented by "millfeeds", *i.e.*, the portion of the wheat which is removed in processing operations.

to the contrary. Hearings before the Senate Committee on Agriculture and Forestry, 88th Cong., 2d Sess., Vol. 2, pp. 144–145 (1964). The only statutory requirement was that the Secretary collect a fixed price for each bushel of wheat.[17]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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DECEMBER 1966.

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[17] Petitioners also overlook the fact that Congress prescribed the use of a conversion factor, and a simple conversion factor could not be devised if quality were taken into account. The implication in petitioners' argument is that the Secretary was under some legal duty to establish a complex system which would give effect to the infinite variations present in the condition of wheat and its usages. However, there is nothing in the statute requiring the Secretary to formulate such a system.

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In the

Supreme Court of the United States

OCTOBER TERM, 1966

THE MORRISON MILLING COMPANY,
Petitioner,

v.

ORVILLE L. FREEMAN AND COMMODITY CREDIT CORPORATION,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER THE MORRISON MILLING COMPANY

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WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

No. 692

In the

Supreme Court of the United States

OCTOBER TERM, 1966

THE MORRISON MILLING COMPANY,
Petitioner,

v.

ORVILLE L. FREEMAN AND COMMODITY CREDIT CORPORATION,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER THE MORRISON MILLING COMPANY

Petitioner The Morrison Milling Company, as is to be expected, takes exception to a number of statements made in the Brief for the Respondents in Opposition ("Brief in Opposition"). The exception to one such statement is of such consequence that it requires this Reply Brief under Rule 24(4).

The Brief in Opposition, pp. 11-12, asserts that the 89th Congress, in enacting the Food and Agriculture Act of 1965, 79 Stat. 1202—which extended the wheat marketing certificate program for the wheat crop marketing years 1966 through 1969, with certain modifications, but in precisely the same

operative language as that certificate program existed for the crop years 1964 and 1965 under the Agricultural Act of 1964, 78 Stat. 173—"explicitly rejected" the Petitioner's contentions, "thus disposing of comparable claims under the 1965 Act, and depriving the issue of any prospective significance."[1]

This assertion is erroneous, both factually and legally.

Factually, the only thing cited in its support by the Brief in Opposition, pp. 11-12, is House Rep. No. 631, 89th Cong., 1st Sess., p. 44. Yet, examination of this House Report negates any such supposed "explicit rejection" by Congress because of these facts: House Report No. 631 *was not* approved by 11 members of the committee (in which the total voting on "major amendments" ranged from 23 to 35); that "Additional Minority Views" of four committee members noted accord with Petitioner's position by stating that:

> "The domestic certificates apply only to human food use, thus wheat used for cat, dog, and other pet foods, together with certain industrial wheat products would not be subject to the certificates" (House Rep. No. 631, pp. 111, 136);

that the bill (H.R. 9811) reported by this House Report *was not* enacted: the Senate "struck out all after the enacting clause of H.R. 9811 and substituted a Senate amendment

[1] The purpose of this assertion was to attempt to refute one of the reasons advanced by Petitioner for the granting of the writ, to wit: "Involved are extraordinarily large amounts of money—estimated by the Government itself to total some $95 million dollars for each year in controversy (R. 39). This question is, moreover, of continuing vital concern to wheat processors—and the sums of money in dispute will continue to pyramid—under the subsequent wheat subsidy program [The Food and Agriculture Act of 1965, 79 Stat. 1202] which extended the marketing certificate liability of processors, in precisely the same operative statutory language here at issue, for the wheat crop years of 1966 through 1969." (Petition for Certiorari, p. 14).

which, while dealing with the same subject matter, differed from it in several major respects"; and, after points of difference between the House bill and the Senate amendment had been resolved by conference committee, Conference Report No. 1123, upon which the bill was then passed by both houses, recommended that "the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows * * * ". 1965 U.S. Code & Admin. News, pp. 3957, 4020; Conference Rept. No. 1123, 89th Cong., 1st Sess. (Oct. 6, 1965).

Moreover, as a matter of law, such isolated statements in committee reports made well after the enactment of legislation cannot determine the meaning of that legislation. *Fogarty v. United States*, 340 U.S. 8, 13-14 (1950); *United States v. United Mine Workers*, 330 U.S. 258, 282 (1946); *Penn Mutual Life Ins. Co. v. Lederer*, 252 U.S. 523, 537-38 (1920). Indeed, to permit pending cases thus to be retroactively disposed of by any such statement placed in subsequent "legislative history"—which could be done, perhaps, even at the instance of the administrative body whose practices are being questioned in such cases—would be a dangerous precedent, which in itself demonstrates further need for the Court to grant the petition for a writ of certiorari sought in the present appeal.

It is, in fact, anomalous that the Brief in Opposition even attempts to rely upon the Food and Agriculture Act

of 1965[2]—for the regulations issued under that Act by the Secretary for the 1966 wheat crop year graphically demonstrate the error of the Respondents' primary argument: the supposed "equivalence" between the face amount of the certificate payments made to farmers (70¢ per bushel in 1964; 75¢ per bushel in 1965) and the certificate liability of the wheat processors (also 70¢ per bushel in 1964 and 75¢ per bushel in 1965) under the 1964 Act. Operating under precisely the same operative statutory language which requires the Secretary to fix the face value of marketing certificates,[3] *for the*

[2] It is also anomalous, Petitioner submits, for the Respondents to have contended before Congress that the wheat marketing certificate program would not result in any increase in the price of flour (Brief in Opposition, pp. 17-18; Petition for Certiorari, pp. 22-24)—and now to make the claim, *totally outside of the record*, that wheat processors should be denied recovery because a supposed increase in the price of flour "presumably" passed on to their customers the cost of marketing certificates. Brief in Opposition, p. 11 at fn. 9.

Moreover, Respondents' further assertion that there "is no reason to suppose that petitioners would pass on to their customers that portion of the cost which they seek to recapture in this litigation" (Brief in Opposition, p. 11 at fn. 9) is totally without foundation in the record and is, in fact, erroneous: many of the wheat processors would, by contract, be required to pass on to their customers substantial portions of any recovery in this case. And, in no event would any supposed "passing on" afford any defense to the actions of the Respondents in illegally increasing the marketing certificate liability of the wheat processors to the extent of some $95 million dollars per year. Cf. *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-35 (1918); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 335 F. 2d 203 (7th Cir. 1964).

[3] Both the Agricultural Act of 1964 (applicable to 1964 and 1965 wheat crop years) and the Food and Agriculture Act of 1965 (applicable to the 1966-69 crop years) provide in this regard in 7 U.S.C. § 1379c(c): "The Secretary shall determine and proclaim for each marketing year the face value per bushel of wheat marketing certificates. The face value per bushel of domestic certificates shall be the amount by which the level of price support for wheat accompanied by domestic certificates exceeds the level of price support for wheat not accompanied by certificates (noncertificate wheat)."

1966 crop year the Secretary fixed the face value of certificate payments made to farmers at $1.63 per bushel and the face value of the certificate liability of wheat processors at 75¢ per bushel (Brief in Opposition, p. 8 at fn. 6). Petitioner invites, without further comment, the Court's consideration of this fact in view of the Respondents' assertions that the purpose of the wheat marketing certificate program would be "thwarted" if their theory of "equivalence" between certificate payments and certificate liability were rejected, to-wit:

> "Petitioners' contentions ignore the nature of the program Congress devised. From the Act as a whole *it is clear that Congress anticipated that the total number of certificates issued to farmers would equal the total number of certificates needed by processors*—at least if the Secretary's forecast of 'the total amount of wheat [that] will be used * * * for food products for consumption in the United States' (7 U.S.C. 1379b) proved accurate. *The Act does not involve two distinct types of domestic certificates—one for farmers and one for processors—but only a 'marketing certificate' that was to be issued to farmers and purchased by processors.* See 7 U.S.C. 1379c(a) and (c), 1379d(b). It was thus hoped that the processors would bear the cost of this aspect of the wheat subsidy program. Under petitioners' interpretation of the Act, processors would have needed significantly fewer certificates than were to be issued under the Act to farmers. *That interpretation, therefore, would frustrate the congressional purpose to balance the payments to the growers by receipts from the processors* * * *" (Brief in Opposition, p. 14) (Emphasis added).

For the foregoing reasons and for the reasons stated in the Petition for a Writ of Certiorari, this petition should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William D. Neary, attorney for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that copies of the foregoing Reply Brief of Petitioner The Morrison Milling Company were on this 5th day of January, 1967, served upon Respondents Orville L. Freeman and Commodity Credit Corporation by mailing copies of such Reply Brief, properly addressed, with air mail postage prepaid, to:

(i) the Honorable Thurgood Marshall, Solicitor General of the United States, U. S. Department of Justice, Washington, D. C. 20530.

(ii) Barefoot Sanders, Assistant Attorney General, David L. Rose and Leonard Schaitman, Attorneys, U. S. Department of Justice, Washington, D. C. 20530.

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